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State of Utah v. Leonard Stewart : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
vs.	:	Case No. 20090572-CA
	:	
LEONARD STEWART,	:	
	:	
Defendant/Appellant	:	
	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT JUDICIAL COURT, STATE OF UTAH,
FROM THE JUDGMENT AND SENTENC OF THE HONORABLE GARY D. STOTT
FOR RETAIL THEFT WITH PRIOR CONVICTIONS, A THIRD-DEGREE FELONY

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ORAL ARGUMENT REQUESTED

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REPLY BRIEF OF APPELLANT

ARGUMENT

**I. *ANDERSON* STRICTLY REQUIRES THAT, AS PROOF OF A PRIOR
CONVICION, EVIDENCE OF JUDGMENT PRESENTED AT TRIAL
MUST BE SIGNED AND WRITTEN**

In State v. Anderson, 797 P.2d 1114, 1117 (Utah Ct App 1990), this Court clearly held that “that a judgment of prior conviction be written, clear and definite, and signed by the court (or the clerk in a jury case) in order to serve as the basis for enhancing a penalty pursuant to Utah Code Ann. § 76-6-412(1)(b)(ii) (1990).” And that “[a]bsent any showing that a signed, written judgment...was entered, the evidence is inadequate to support the trial court's finding that [the defendant] had been twice convicted of theft. Thus, the finding to that effect is clearly erroneous.” Id. Here, however, Stewart refutes the State’s belief that Anderson is distinguishable because: (1) the trial court reviewed the court file

corresponding to the 2003 unsigned conviction; or, in the alternative, (2) the judgment was signed, *nunc pro tunc*, post-trial.

a. Regardless of the Trial Court Having Reviewed the 2003 Court File, the Judgment Provided at Trial was Unsigned and Insufficient to Prove a Prior Conviction

In Anderson, this Court set forth several, ostensibly non-exhaustive, reasons requiring that judgments be signed and written. These reasons are:

(1) entry of a time-stamped, written judgment fixes clearly on the record the date of the judgment, thereby simplifying the question of when the time begins to run for post-trial motions, filing notice of appeal, and for any probation ordered; (2) a written judgment in proper form is clear evidence of the defendant's conviction in later proceedings; (3) a written judgment signed by the judge helps assure the absence of clerical error or misunderstanding in the record and shows that responsibility for the judgment rests on the shoulders of the judge; and (4) it provides at least the beginning of a basis for meaningful review of the judgment.

Anderson, 797 P.2d, at 1115-1116. The State argues that Anderson is distinguishable. This case, according to the State, contrasts “the various and sundry court records presented in Anderson[.]” because “the trial court was presented with the unsigned 2003 judgment *and* the entire Fourth District Court file pertaining to the judgment.” Appellant’s Br. at 9.

Accordingly, the State’s argument calls to vitiate the principles and reasons set forth by this Court calling for such strict compliance. Stewart, however, contends that this Court should reaffirm the Anderson principle in this case because the issue at hand is precisely what a signed, written judgment aimed to prevent.

As noted, this Court predicated the Anderson principle on the bases that a signed, written judgment, “in proper form[,] is clear evidence of the defendant’s conviction in

later proceedings[.]” Anderson, 727 P.2d, at 1116. Here, the prosecution failed to comply with this strict requirement at trial, and the fact that the trial court reviewed the District Court file corresponding to the 2003 conviction during trial does not overcome that the Judgment – even the original in the Court file – was unsigned. Therefore, the trial court clearly erred by considering the unsigned judgment of a prior conviction at trial. Cf. Anderson, 797 P.2d, at 1117 (holding that the trial court was “clearly erroneous” in finding that an unsigned judgment was sufficient evidence of a prior theft conviction.”).

b. The *Nunc Pro Tunc* Signing Occurred Post-Trial and Only Retroactively Validates the 2003 Conviction, Not the Validity of the Document When Presented At Trial

In a footnote, this Court presented the option that “[d]epending on the circumstances of a particular case, the lack of a signed judgment could perhaps have been corrected as a clerical error (see Utah R.Civ.P. 60(a); see also Utah R.Crim.P. 22(e)) or by entry *nunc pro tunc*, with any required opportunity for the defendant to respond.” Anderson, 797 P.2d, at 1117, n. 13. The State believes that the post-trial judgment, signed *nunc pro tunc*, of the 2003 conviction¹ qualifies as sufficient evidence of a prior conviction. Stewart, however, contends that this footnote is dictum and not applicable.

Stewart concurs that the dicta relied on in Anderson articulates that a judgment may be corrected *nunc pro tunc*. However, Stewart contends that a judgment signed *nunc*

¹ For purposes of this argument, if this Court chooses to consider the 1988 judgment despite the fact that the trial court made no findings or determinations regarding it, Stewart’s position is that the 2003 and 1988 judgment are indistinguishable. See, Bailey v. Bailey, 2002 UT 58, ¶ 22, 52 P.3d 1158 (holding that appellate court are limited to the facts determined by the trial court).

pro tunc cannot be used post-trial to prove to the trier of fact that a prior conviction actually occurred. The State’s position that proof of priors – an element third-degree felony charges in this case – can be corrected outside the trial phase. As Stewart argued in his brief, it is the State’s burden to prove every element of the offense, which includes introducing proof of a valid prior under Anderson. See, Appellant’s Br. at 15-23.

At oral argument and in his Motion to Arrest Judgment, Stewart argued that “without a signed judgment at the time of trial to [the trial court] as the trier of fact, the state failed in its attempt to prove that [Stewart] had necessary prior to substantiate a third degree felony.” (R. 80: 2); see also, Motion to Arrest Judgment (R: 43-30). Stewart does not contend that the *nunc pro tunc* signing of the 2003 conviction does not correct the record in *that* case. If there were any dispute regarding the 2003 conviction, the *nunc pro tunc* signing corrects that error. However, it must be that the *nunc pro tunc* signing does not retroactively validate what was insufficient evidence under Anderson post trial.²

II. THE TRIAL COURT WAS ON NOTICE OF EVIDENTIARY ISSUE REGARDING THE UNSIGNED JUDGMENT

The State claims that Stewart’s issue that the trial court erred by considering evidence of his prior convictions post-trial was not preserved. Stewart disagrees. “To preserve an issue for appeal, the issue must have been presented to the trial court in such a way that the court has an opportunity to rule on that issue.” 438 Main Street v. Easy

² If this Court finds that proof of priors under Utah Code Ann. §76-6-412(1)(b)(ii) is an element of the offense, the State cannot post-trial present or correct insufficient evidence. See, Utah R. Crim. Pro. 17(g).

Heat, Inc., 2004 UT 72, ¶ 51, 99 P.3d 801 (internal quotations omitted). The trial court was presented this issue during trial and in Stewart’s Motion to Arrest Judgment.

First, Stewart presented this issue at trial. Although Stewart did not object, initially, to the admission of the 2003 judgment, after the prosecution rested, Stewart immediately brought this issue to the court’s attention. Defense counsel argued that the unsigned document apparently reflected what was in the district court file – in that it purported to be a judgment and sentence of a 2003 theft. However, Defense counsel argued that that an unsigned judgment is no judgment at all, specifically regarding proof of prior convictions. In conclusion, defense counsel stated that “it would be my argument that the stat’s not carried its burden to prove the prior convictions, because they proved on one prior conviction, and for this to be a felony, it needs to – the state needs to establish the existence of two prior felonies.” (R. 79: 42-43).

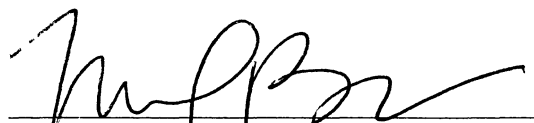
Furthermore, while still before the trial court and before sentencing, Stewart filed a Motion to Arrest Judgment and Reply. (R. 43-30; 50-45). Although Stewarts initial motion objects to the supplemental evidence indirectly, his Reply motion specifically addresses that proof of priors is an element of the offense and cannot be presented post-trial. (R. 49). Here, it appears that the State would like this Court not to address this issue because Stewart did not “object when the prosecutor asked at trial to be allowed to present supplement evidence of Defendant’s prior convictions at sentencing.” Appellee Br. at 13. The issue here is not that Stewart did not object to supplemental evidence post-trial because he clearly did, albeit in a different format. As shown, Stewart brought the issue of whether the 2003 unsigned judgment (or “supplemental evidence”) before the

trial court, during trial and in his motions.³ Therefore, this Court should consider the issues presented in Sections II and III of his brief.

CONCLUSION AND PRECISE RELIEF SOUGHT

Stewart respectfully requests that this Court reverse the trial court's ruling and enter the conviction as a class B misdemeanor because the unsigned 2003 judgment did not comply with Anderson and was insufficient evidence of a prior, and, accordingly, that because proof of priors is an element of the offense, the post-trial evidence cannot retroactively correct invalid judgment. See, State v. Dunn, 850 P.2d 1201, 1209, 1211 (Utah 1993).

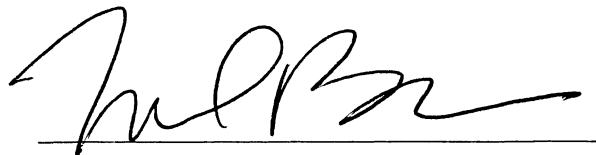
RESPECTFULLY SUBMITTED this 30 day of August, 2010.



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CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 2nd day of August, 2010.



³ The trial court, without the aid of supplemental evidence, post trial, found the 2003 unsigned judgment was proof of a prior conviction. (R. 79: 44). That is the issue. The prosecution's attempt to offer "supplemental evidence" post-trial goes to the argument that proof of priors is an element of the offense and cannot be presented at sentencing.